

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 28, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP329-FT**

**Cir. Ct. No. 2010CV111**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**MICHAEL J. WALDVOGEL TRUCKING, LLC,**

**PETITIONER-RESPONDENT,**

**V.**

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,**

**RESPONDENT-APPELLANT,**

**DANIEL M. BERCEAU,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Langlade County:  
FRED W. KAWALSKI, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission appeals an order reversing its determination that Daniel Berceau did not commit misconduct connected with his employment pursuant to WIS. STAT. § 108.04(5) (2009-10).<sup>1</sup> The Commission argues there can be no misconduct connected with employment if no employment relationship exists. We agree and therefore reverse the order.

### **BACKGROUND**

¶2 The relevant facts are undisputed. In January 2008, Berceau was hired by Michael J. Waldvogel Trucking, LLC, as a truck driver—a position that requires possession of a commercial driver’s license. Berceau was laid off in May 2009 due to a lack of work. On August 12, 2009, Berceau was recalled to his previous job and submitted to a drug test the next day. Berceau’s employment was terminated on August 18, after Waldvogel learned Berceau tested positive for marijuana. No evidence indicates that Berceau used marijuana between the time of the August 12 recall and the August 13 drug test.

¶3 Following his discharge, Berceau filed an unemployment insurance claim with the Department of Workforce Development. After determining that Berceau had not been discharged for misconduct connected with his employment, the department found Berceau eligible for unemployment benefits. An administrative law judge reversed that determination and Berceau petitioned the Commission for review. The Commission reversed the ALJ’s determination and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version.

Waldvogel sought judicial review pursuant to WIS. STAT. § 102.23. The circuit court reversed the Commission's decision and this appeal follows.

### DISCUSSION

¶4 In an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court. *Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701. We may set aside the Commission's decision only when: (1) the Commission acted without or in excess of its powers; (2) the Commission's order or award was procured by fraud; or (3) its findings of fact do not support the order or award. *See* WIS. STAT. § 102.23(1)(e).

¶5 An employee "whose work is terminated by an employing unit for misconduct connected with the employee's work" is ineligible for unemployment insurance. WIS. STAT. § 108.04(5). Whether an action constitutes "misconduct" sufficient to render an employee ineligible for unemployment benefits is a question of law. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 302-03, 558 N.W.2d 874 (Ct. App. 1996). When reviewing the Commission's conclusions of law, we are not bound by its decision. *DILHR v. LIRC*, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990). We may, however, accord the agency one of three levels of deference: great weight, due weight, or no deference at all. *Jicha v. DILHR*, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992). Although the parties dispute the proper level of deference this court should accord the Commission's legal conclusions, we need not resolve the dispute because, regardless of the level of deference, we would affirm the Commission's decision.

¶6 Our supreme court has held that no employment relationship exists following layoff for an indefinite period. *A.O. Smith Corp. v. DILHR*, 88 Wis. 2d

262, 269-70, 276 N.W.2d 279 (1979). Here, the Commission found that Berceau's layoff was indefinite as Waldvogel did not tell Berceau it would ever be recalling him to work. The record supports that finding. Therefore, Berceau's pre-recall marijuana use cannot constitute misconduct connected with Berceau's work, as no employment relationship existed at that time.

¶7 Waldvogel nevertheless argues that Berceau is ineligible for unemployment compensation pursuant to WIS. STAT. § 108.04(1)(b)1. That statute governs general disqualification and limitations on eligibility for benefits and provides, in relevant part, that an employee is ineligible for unemployment compensation benefits if he or she is "terminated due to the employee's unavailability for work or inability to perform suitable work otherwise available with the ... employer." *Id.*

¶8 Waldvogel emphasizes that after failing the drug test, Berceau did not meet the conditions necessary to reinstate his commercial driver's license. Waldvogel therefore contends that without the license, Berceau was unable and unavailable to work. As the Commission notes, however, Berceau's inability to perform work requiring a commercial driver's license does not render him generally unavailable for work as he can do any driving work for which a commercial driver's license is not required, as well as any non-driving work he is capable of. Waldvogel did not establish that other types of employment were unavailable.

¶9 Because there was no misconduct connected with his work at Waldvogel, the Commission properly concluded Berceau was eligible for unemployment benefits. Further, the absence of a commercial driver's license did not render Berceau ineligible for benefits pursuant to WIS. STAT. § 108.04(1)(b)1.

Therefore, we reverse the circuit court's order and remand for reinstatement of the Commission's decision.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

